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The Implications of Transition Theory for Stare Decisis

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I. INTRODUCTION

Courts and commentators have long had difficulty with the doctrine of stare decisis. The first troubling issue is identifying the source of the doctrine. Although a few scholars have argued that the obligation to adhere to precedent is of constitutional origin,[1] the vast majority of judges and commentators consider the doctrine merely prudential.[2] It is somewhat incongruous, however, to consider a prudential doctrine as imposing a binding obligation.[3] Why do courts ever adhere to decisions

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1. *See, e.g.*, Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 218–19 (1989) (arguing that support for rule of absolute statutory stare decisis can be found in constitutional delegation of legislative power to Congress); Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 754 (1988) (suggesting that stare decisis may be a constitutional imperative compelled by the structure and nature of Article III, and the role of the courts that it creates); Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344 (1990) (reasoning that a constitutional requirement of stare decisis may be based upon the formal constitutional amendment process provided by Article V).

2. *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 828 (1991) ("Stare decisis is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'") (citation omitted); Agostini v. Felton, 521 U.S. 203, 235 (1997) (stare decisis reflects "a policy judgment that 'in most matters it is more important that the applicable rule of law be settled than that it be settled right.'") (citation omitted); *but see* Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALB. L. REV. 671, 680 (1995) (claiming that stare decisis is unconstitutional).

3. Commentators have identified a variety of policy reasons for the doctrine, which will not be repeated here. *See, e.g.*, Jonathan Macey, *The Internal and External*

with which they disagree? This raises a fundamental logical flaw in the doctrine.

This leads naturally to the second problem—the ambiguous scope of stare decisis doctrine. Courts have formulated a variety of legal tests that are not readily reconciled. From a policy perspective, it is difficult to identify the key factors or to determine how they should be weighed.[4] Indeed, it is arguably a misnomer to describe stare decisis as a legal doctrine as well as perhaps misleading to describe precedents in terms of obligation. In reality, as Michael Paulsen has observed, "precedents are sometimes binding and sometimes not."[5]

The resulting uncertainty of application has caused some commentators to argue that the doctrine is politically charged and subject to easy manipulation.[6] Courts are never truly bound by precedent, the argument goes. As a result, when courts claim to rely on stare decisis, they are being disingenuous, using the doctrine to mask the true basis of their decision. That such evasion is possible, because of the flexible scope of the doctrine, is troubling. More troubling is the normative premise that stare decisis allows or requires courts to apply erroneous legal rules. This creates a conflict between stare decisis and other core values of the legal system.[7] On the other hand, the rule of precedent is generally understood as

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Costs and Benefits of Stare Decisis, 65 CHI-KENT L. REV. 93 (1989) (identifying benefits of stare decisis from an economic perspective); Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. REV. 643, 648 (2000) (defending stare decisis in terms of its cost-saving functions).

4. The multiple opinions in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), for example, demonstrate three different conceptions of the scope of stare decisis doctrine. The plurality argued that principles of stare decisis precluded overruling *Roe v. Wade*, 410 U.S. 113 (1973). *See* 505 U.S. at 853 (plurality opinion). Justice Blackmun argued that the plurality gave too little weight to the precedential value of *Roe*, stating that stare decisis required the Court to strike down more of the Pennsylvania statute. *Id.* at 934 (Blackmun, J., concurring in part and dissenting in part). Justice Rehnquist too found fault with the plurality's use of stare decisis but reasoned that it had given *Roe* too much, rather than too little deference. *Id.* at 944 (Rehnquist, J., dissenting).

5. Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 295 (1994).

6. *See, e.g.*, John Wallace, Comment, *Stare Decisis and the Rehnquist Court: The Collision of Activism, Passivism and Politics in Casey*, 42 BUFF. L. REV. 187, 250 (1994) (arguing that "[t]he joint opinion's use of stare decisis in *Casey* was overtly political, and therefore, deplorable"); Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 402 (1988) (describing stare decisis as a "doctrine of convenience"); Leslie A. Lunney, *The Erosion of Miranda: Stare Decisis Consequences*, 48 CATH. U. L. REV. 727, 792 (1999) (stating that stare decisis tends "to insulate courts from charges of usurping political functions").

7. *See, e.g.*, Christopher J. Peters, *Foolish Consistency: On Equality, Integrity,*

a core component of our judicial system. Despite its flaws, courts and commentators continue to defend some form of stare decisis.

This essay argues that existing theories of stare decisis fail adequately to account for the role of courts in the lawmaking process. If we accept, as we should, that courts make legal rules, at least to some extent, than the doctrine of stare decisis sets one of the parameters for the temporal scope of adjudicative legal change. Stare decisis limits the power of a court to change a prior judge-made rule. Accordingly, the rules of stare decisis determine the permissible scope of judicially initiated legal change.

From a policy perspective, the doctrine of stare decisis then represents a choice among lawmaking alternatives. By constraining courts, a strict rule of stare decisis requires other institutional decisionmakers to initiate legal change through vehicles such as statutory override or constitutional amendment. A more liberal rule empowers courts to initiate change themselves rather than deferring to other lawmaking institutions. More generally, by providing the necessary requirements for judicially initiated legal change, the doctrine determines both how and when legal change will occur. As a result, stare decisis is properly understood as a transition doctrine.[8]

A subsidiary element of this analysis concerns a court's decision to overrule a precedent. Obviously judge-made law is in a constant state of transition. Courts refine, distinguish and modify prior precedents constantly, and would continue to do so under the strictest possible interpretation of stare decisis. Given the ability of courts effectively to evade the obligation of precedent without affirmatively overruling, does it make sense to view stare decisis as a functional constraint on legal change?

This Article argues that it does. Courts themselves appear to consider stare decisis as a binding constraint, at least in some cases. Even when courts overrule a precedent, they typically take pains to justify overruling in terms that extend beyond disagreement with the prior

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and Justice in Stare Decisis, 105 YALE L.J. 2031, 2048 (1996) (describing stare decisis as promoting consistency at the expense of justice).

8. Leading works on transition analysis include Michael Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. PA. L. REV. 47 (1977); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986); Daniel Shaviro, WHEN RULES CHANGE: AN ECONOMIC AND POLITICAL ANALYSIS OF TRANSITION RELIEF AND RETROACTIVITY (U. Chi. Press 2000); Saul Levmore, *Changes, Anticipations and Reparations*, 99 COLUM. L. REV. 1657 (1999).

decision. Moreover, courts apparently identify an independent value in overruling a precedent, as opposed to merely distinguishing it. Although courts can surreptitiously evade the obligations of precedent, they consistently confront those obligations directly. The fact that courts can effect legal change without overruling suggests an independent legal significance to the decision to overrule.

Rather than constraining the scope of adjudicative legal change, stare decisis may alternatively be understood as specifying the form in which that legal change occurs. A court that is precluded from ignoring or overruling a precedent is limited to more evolutionary forms of lawmaking. Over a series of decisions, a precedent that is never formally overruled may lose much of its force through incremental judicial decisionmaking. At the same time, however, incremental legal change provides a measure of transition relief that overruling does not. Accordingly, the choice between overruling and incremental legal change triggers the fundamental issues in transition policy.

This essay develops an analysis of stare decisis as a transition doctrine. Using transition theory, the essay offers an alternative conceptualization of stare decisis that refocuses the inquiry in terms of the nature of judicial lawmaking. Although a comprehensive jurisprudence of adjudicative lawmaking is beyond the scope of this essay, transition theory demonstrates that key normative assumptions about the lawmaking process inform the debate over stare decisis doctrine. By unmasking those assumptions, the essay sets forth the ground rules for further analysis. At the same time, an examination of stare decisis offers a new perspective on transition analysis and provides some tools with which to evaluate the key assumptions of modern transition theory.

The essay proceeds as follows. Part II describes the doctrine of stare decisis and explains how principles of stare decisis constrain the temporal scope of judicial lawmaking. In particular, Part II demonstrates that existing theories of stare decisis focus primarily on a merit-based assessment of the old legal rule and identifies the weaknesses of this approach. Part III extends traditional stare decisis doctrine by incorporating transition theory. In Part IV, the essay identifies and evaluates the key assumptions of modern transition analysis. Finally, Part V uses stare decisis analysis to highlight new reasons to reconsider transition theory's conclusions about the appropriate manner of legal change.

II. TRADITIONAL STARE DECISIS DOCTRINE

A. The Scope and Significance of Stare Decisis as a Constraint on Overruling

It is helpful to begin the discussion with a formal definition. The doctrine of stare decisis determines the circumstances under which a second court which considers itself bound by decisions of the first court but disagrees with the legal rule adopted by the first court may or may not change that legal rule. Two elements of this definition should be emphasized. First, stare decisis is significant only in cases in which the second court disagrees with the previously-adopted legal rule.[9] In cases in which the second court's analysis of the law would lead it to the same legal conclusion, the doctrine of stare decisis does no work—the outcome in the second case is unaffected by whether the court considers itself bound. Second, the definition presumes that the second court considers itself constrained, to some extent, by the prior decision. To the extent that the second court can evade the impact of the legal rule other than by overruling it, the court is not changing the rule for purposes of this essay.

This second factor is important. Under any rule of stare decisis, courts are only incompletely bound by prior decisions. The second court has, at its disposal, a variety of mechanisms with which to evade the effect of the precedent, including distinguishing the precedent, characterizing components of the old rule as dicta, and so forth.[10] In principle, these tools offer courts expansive power to avoid prior decisions without overruling them. Nonetheless, and despite the easy availability of alternatives, courts do overrule precedents. The persistence of affirmative overrulings suggests that overruling a precedent has an independent lawmaking value that is imperfectly replicated through the alternative mechanisms. Although the alternatives may enable a court to reach its desired outcome, they do not have the same lawmaking effect.

Indeed, for purposes of this essay, the distinction between overruling and its alternatives is key. The doctrine of stare decisis constrains

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9. *See* Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 4 (1989).

10. *See, e.g., id.* at 18 (describing what successor courts can do in terms of narrowing, broadening, and distinguishing prior rules). *See also* Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 384 (1988) (explaining "that it often is difficult to determine whether a court is deliberately altering preexisting doctrine or making a good faith effort to interpret prior case law").

overruling—a distinctive method of legal change—and requires, in those cases in which it applies, one of two alternatives. The first alternative, is incremental lawmaking through the traditional common law methodology.[11] In contrast to overruling, traditional adjudicative legal change is incremental. Specific decisions involve changes of smaller magnitude. In addition, the speed and direction of change is more ambiguous. A third court, taking at face value the second court's effort to distinguish the first court's legal rule, could continue to apply the initial rule. Even if the second court's decision serves as a signal that the legal rule is problematic, the rule's application need not be immediately and universally terminated. Accordingly,[12] some class of litigants may continue to governed by the old legal rule. Thus distinguishing and other incremental forms of legal change afford parties some degree of transition relief that is not available when the court explicitly overrules a precedent.

The second alternative when stare decisis does not permit a court to change the law by overruling is for another lawmaker to effect the change. Congress can enact new legislation to overrule decisions involving statutory interpretation or common law rulemaking. The Amendment process provided by Article V provides a mechanism to overrule constitutional decisions.[13] Some constitutional decisions can also be effectively overruled by other means; for example, states can overturn the Supreme Court's decision to limit federal constitutional rights by interpreting their own constitutions to provide such rights.[14] There is an important distinction, however, between overruling and these lawmaking alternatives. When a court overrules a precedent, the new legal rule is applied retroactively to all pending and future cases.[15] Parties that relied upon the old rule are not accorded transition relief. In contrast, statutory changes and constitutional amendments generally apply prospectively.[16]

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11. *See* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1107–08 (1997) (distinguishing evolutionary adjudicative legal change from legal change implemented through judicial overruling).

12. *See* Marshall, *supra* note 1, at 177 (describing ability of Congress to overrule judicial precedents by enacting new legislation); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988) (identifying limitations on legislative ability to overrule statutory precedents and proposing alternative "evolutive" approach).

13. *See* Note, *supra* note 1, at 1355–56 (describing constitutional amendment process and identifying the process as an alternative to judicial overruling).

14. *See generally Symposium: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 959 (1985) (describing the development of state constitutional rights that extend greater protection than that offered by the federal constitution).

15. *See* Fisch, *supra* note 11, at 1061–63 (describing rule of full retroactivity for judicial lawmaking).

16. Although the blanket characterization represents something of an overstatement, the black letter rule is that statutes apply prospectively and judicial decisions operate

B. Common Doctrinal Formulations

The Supreme Court has articulated the doctrine of stare decisis in several ways. Although consistently maintaining the operative principle that subsequent courts cannot ignore authoritative decisions of prior courts with which they disagree, the Court has identified a variety of reasons that justify overruling a precedent. Central to the Court's approach, in most cases, is an evaluation of the quality of the old legal rule. The Court has described the nature of the required defect in several ways, but most commonly has characterized the initial decision as erroneous or incorrect. In its most extreme form, the Court's treatment of stare decisis appears to require little more than a determination that the prior rule was, to some degree, wrong.

This approach is illustrated by the Court's decision in *Payne v. Tennessee*.[17] The Court's justification for overruling was simple: it concluded that its earlier decisions in *Booth v. Maryland*[18] and *South Carolina v. Gathers*[19] "were wrongly decided and should be, and now are, overruled."[20] Similarly, the position of the dissenters in *Planned Parenthood v. Casey*[21] has been characterized as applying the standard of "overrule when wrong."[22] A number of cases have qualified the requirement, stating that mere legal error is insufficient; instead the decision must be manifestly or egregiously incorrect.[23] Nonetheless, in its simplest form, this "wrongness" approach places little value on precedent.[24]

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retroactively. *Id.* at 1057.

17. 501 U.S. 808 (1991).

18. 482 U.S. 496 (1987).

19. 490 U.S. 805 (1989).

20. *Payne*, 501 U.S. at 830.

21. *Casey*, 505 U.S. at 944 (Rehnquist, J., dissenting) ("We believe that Roe was wrongly decided, and that it can and should be overruled consistently with our traditional approach to stare decisis in constitutional cases.").

22. Kathleen M. Sullivan, *The Supreme Court 1991 Term Forward: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 74 (1992).

23. *See, e.g.*, United States v. Gaudin, 515 U.S. 506, 521 (1995) (concluding that stare decisis need not be followed "when decision in question has been proved manifestly erroneous").

24. As Justice Scalia has stated, allowing a judge to ignore stare decisis simply by demonstrating that the overruled opinion was wrong, without more, would completely nullify the effect of the doctrine. Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in the judgment).

In addition to operating as a minimal constraint on overruling, by premising its operation on the characterization of the prior precedent as right or wrong, the wrongness approach is based on a strained conception of judicial decisionmaking. Although it is occasionally possible to characterize a lower court decision as misapplying clearly applicable precedent, most judicial decisionmaking is not readily characterized as right or wrong, and efforts to do so reflect a false sense of scientific certainty. To the extent that courts articulate binding legal rules, they are making law, and lawmaking is neither objective nor ministerial.

The point can readily be seen by reference to legislative lawmaking. When Congress enacts a new statute, the merits of the statute can be evaluated in a variety of ways. Various jurisprudential theories offer criteria for determining what the law should be, but the statute's failure to meet any or all of those criteria does not make it wrong. Indeed, it would be surprising if a statute could be characterized as wrong based on its failure to meet the criteria of a particular legal theory, given the frequency with which the criteria of different theories conflict. Rather, legal rules reflect a choice among normative principles and policies. A lawmaker may adopt a statute that reflects bad policy in the sense that he has chosen undesirable values to further or because his chosen statute does a poor job of furthering those values. As a result, critics may argue that a statute should not have been adopted, or that the statute is bad policy. The fact that the statute reflects bad policy, however, does not thereby make it "wrong." It is simply incoherent to apply the concept of wrongness to the statute.

The same analysis applies to judicial lawmaking. Courts incorporate values, interpretive principles, political considerations and policy preferences into their decisions. At every stage, reasonable people, indeed reasonable jurists, may disagree as to the appropriate criteria to be used in reaching a decision. Yet, the selection of these criteria more closely resembles a choice than the identification of an objective truth. Moreover, the selection of those criteria, rather than the application of the criteria, often determines the result. A subsequent court's disagreement with a prior precedent is more likely to reflect a disagreement about the prior court's selection of decisional principles than the application of those principles.

For example, judges might disagree over whether a statute is to be interpreted solely by reference to the text or whether it is also appropriate to consult the legislative history or to incorporate policy considerations. The continued judicial and academic debate over the choice of interpretive

methodology,[25] as well as the questionable range of application of one's chosen approach,[26] undercut any claim that a given decision is objectively correct in the sense of absolute truth. Moreover, as with the statute, the choice of incorrect methodology or the pursuit of undesirable objectives does not making the resulting rule incorrect.[27]

This observation applies with the most force to Supreme Court precedent. Few legal issues reach the Supreme Court if their resolution is obvious. The presence of a circuit split, a virtual prerequisite to a grant of certiorari, indicates disagreement among federal appellate judges. Even when the case is decided, the decision may not command the support of all members of the Court. The outcome of the case may reflect a variety of policy, methodological and political choices, but is unlikely to demonstrate that the minority view is objectively without merit. At the same time, the decision results in a precedent that, at the time it is announced, has garnered the support of a majority of the members of the highest Court in the nation. Can a rule that garnered the support of at least five of the nation's finest jurists persuasively be attacked as wrong?

Thus, the wrongness approach is better understood as a court's decision to privilege its view of the right over the view of a predecessor court. Larry Alexander offers a definition of "wrongness," for stare decisis purposes, that attempts to respond to this concern.[28] Alexander explains:

> when I speak of precedents that are "incorrect" in the eyes of the subsequent court, I am referring to cases of first impression, cases that were directly governed by principles of political morality (or policies derived therefrom) and in which those principles (or policies) were misapplied (in the view of the subsequent court).[29]

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25. *See, e.g.*, Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987) (identifying five different types of constitutional argument that are widely accepted as legitimate).

26. *See, e.g.*, Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 55–63 (1994) (describing how Justices Black and Scalia, both self-described textualists, have failed to adhere to the constitutional text when such an approach conflicted with "their personal and political judgments regarding the role of the federal judiciary in American society").

27. *Cf.* Ahilan T. Arulanantham, Note: *Breaking the Rules?: Wittgenstein and Legal Realism*, 107 YALE L.J. 1853 (1998) (suggesting Wittgenstein can be used to construct a theory of legal correctness).

28. Alexander, *supra* note 9, at 3.

29. *Id.*

Although a subsequent court may well view principles of political morality differently from its predecessor, this disagreement provides little basis for choosing the second court's view over the first.[30] It is therefore tempting to resort to the wrongness characterization as a rhetorical device to undercut the authority of the initial decisionmaker.

One may argue that the wrongness approach mischaracterizes the stare decisis inquiry. Courts, it may be said, do not evaluate whether a decision is wrong in an objective sense; rather, they attempt to determine whether overruling will improve the law. If the new rule is normatively superior to the old rule, than overruling is justified. This approach might be termed the "badness" approach. By focusing on improvement, this approach is consistent with efficiency based theories of legal change, a point that will be developed further below. Moreover, the approach explicitly reflects the role of courts as lawmakers. Recognizing that legal rules reflect a variety of choices in an effort to meet a specified objective, the badness approach enables courts to replace a rule with a better alternative.

Although the badness approach offers a theoretical perspective on stare decisis, it does not appear, as a descriptive matter, to reflect existing doctrine. Few decisions expressly characterize the decision to overrule as an attempt at legal improvement. The Supreme Court's decision in *State Oil Co. v. Kahn*,[31] is perhaps the best example of the badness approach. *Kahn* involved the question of what constitutes a restraint of trade under Section One of the Sherman Antitrust Act. In a 1968 decision, *Albrecht v. Herald Co.*,[32] the Court had held that vertical maximum price fixing was a per se violation of the statute. The Court determined that the per se rule best served the objectives of protecting competition and consumers.[33] In *Kahn*, the Court overruled *Albrecht* and rejected the per se rule.[34] Court justified overruling on the basis that the per se rule was bad policy, explaining that the economic reasoning behind its conclusion in *Albrecht* was flawed.[35] In other words, the Court concluded that the

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30. It is fair to question whether the doctrine of stare decisis is similarly objectionable for privileging the first court's view over the second. Max Stearns makes a similar point in describing stare decisis as contributing to the path dependent nature of judicial decisionmaking. Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1349–50 (1995). I address this point briefly in part V.

31. 522 U.S. 3 (1997).

32. 390 U.S. 145 (1968).

33. *See Kahn*, 522 U.S. at 16–17 (describing rationale for *Albrecht* decision).

34. 522 U.S. at 21.

35. "After reconsidering *Albrecht*'s rationale and the substantial criticism the decision has received, however, we conclude that there is insufficient economic justification for per se invalidation of vertical maximum price fixing." *Kahn*, 522 U.S. at 21.

economic objectives that it had identified in Albrecht would be better served by elimination of the per se rule.

Kahn is, however, atypical. The Court's initial choice of a legal rule, in *Albrecht*, reflected an explicit policy determination, resulting from the Congress's delegation of broad lawmaking authority to the courts under the Sherman Act. In a sense, the Court can be viewed as engaging in a type of lawmaking that resembles the legislative process. As such, it is perhaps unsurprising that the Court articulated its justification for legal change in terms more commonly applied to congressional action. Legislative changes in the law are commonly explained as efforts to improve the law. Whether the identified objective is efficiency, fairness or some other goal, the claim that a legal change results in a rule that better meets this objective is clearly a sufficient justification for the change. Modern transition analysis is premised on the assumption that legal change generally improves the law, an assumption that drives theories about the manner in which legal change should occur. Whether or not such this assumption is appropriate for either legislative or adjudicative lawmaking is an issue I address below.

Nonetheless, courts have expressly rejected the notion that improving the law is a sufficient justification for overruling. As the Supreme Court has repeatedly stated, "In most matters it is more important that the applicable rule of law be settled than that it be settled right."[36] Accordingly, the Court's decisions cannot be read as authorizing courts to ignore legal rules simply because the rules are bad. Courts typically do not conduct an efficiency comparison between the old and new legal rules. Nor is it clear that we would expect them to do so. Under the existing system, a substantial difference between legislative and adjudicative lawmaking is the role of precedent. Legislators face no systemic constraint on their efforts at legal improvement because they are not bound by the decisions of prior legislators.[37]

The Court has also justified overruling in some circumstances in which the defect in the original decision is more technical in nature.[38]

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36. Agostini v. Felton, 521 U.S. 203, 235 (1997) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

37. *See, e.g.*, Cheryl D. Block, *Pathologies at the Intersection of the Budget and Tax Legislative Processes*, 43 B.C. L. REV. 863, 923 (2002) (stating that "it is a well-settled principle of constitutional law that one Congress cannot bind another").

38. *See, e.g.*, Amy L. Padden, Note, *Overruling Decisions in the Supreme Court: The Role of a Decision's Vote, Age, and Subject Matter in the Application of Stare Decisis After* Payne v. Tennessee, 82 GEO. L.J. 1689 (1994) (describing and criticizing

Such defects include an initial decision rendered by a close margin (typically a 5-4 majority),[39] a decision rendered without the benefit of full briefing and argument,[40] a decision on a procedural rule,[41] a decision that is old,[42] and, somewhat inconsistently, a decision that is very recent.[43] Presumably the Court views the technical deficiencies in these cases as a proxy for a merit-based analysis. For example, a close decision arguably is less likely to be correct than one commanding the support of all nine Justices.[44] A very old decision may be out of date.[45] Absent such a view, it is difficult to understand the rationale for according these decisions diminished precedential value. After all, a close decision is no less binding on the parties before the court than a unanimous one.

Perhaps recognizing the danger that a pure merits analysis poses for a system of precedent, the Court often requires some component in addition to a deficiency on the merits—a type of merits plus methodology.[46] Justice Souter argued in *Payne*, for example, that stare decisis requires wrongness plus a "special justification" for a decision to be overruled.[47] In *Payne*, Justice Souter found the special justification to be satisfied by

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Rehnquist-Scalia approach to stare decisis as giving reduced precedential impact to decisions that were rendered by 5-4 votes or were recently decided).

39. *See id.*

40. *See, e.g.*, Hohn v. United States, 524 U.S. 236 (1998) (overruling prior decision involving a procedural rule that had been rendered without full briefing and argument).

41. *See id.*

42. The age of a decision is sometimes cited as a reason for giving stare decisis greater force. *See* South Carolina v. Gathers, 490 U.S. at 824 ("the respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised upon their validity"). Nonetheless, an older decision is more likely to have become "outdated or inconsistent with contemporary values." Padden, *supra* note 38, at 1694.

43. *See, e.g.*, South Carolina v. Gathers, 490 U.S. at 824 (Scalia, J., dissenting) (advocating that erroneous decision be overruled promptly before laws and practices are adjusted to embody it).

44. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 510 (1996) ("Because the 5-to-4 decision in Posadas marked such a sharp break from our prior precedent, . . . we decline to give force to its . . . approach."); Payne v. Tennessee, 501 U.S. 808, 828–30 (1991) ("Booth and Gathers were decided by the narrowest of margins, over spirited dissents . . . . [T]hey were wrongly decided . . . and now [are] overruled.").

45. *But see* South Carolina v. Gathers, 490 U.S. at 824 (Scalia, J., dissenting) ("I had thought that the respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised upon their validity.").

46. *See* Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1108, 1120 n.75 (1995) (describing debate within stare decisis between those who believe that wrongness alone is sufficient to justify overruling and those who believe something more is required).

47. *Payne*, 501 U.S. at 842 (Souter, J., concurring).

the fact that the precedent was both erroneous and unworkable.[48] Similarly, in *Dickerson v. United States*,[49] the Court explicitly stated that although it might disagree with the holding in *Miranda v. Arizona*[50] as a matter of first impression, its disagreement would not justify overruling *Miranda* absent special justification.[51] The Court has identified a variety of factors that, combined with legal error, justify overruling, including a conflict with other precedents, the presence of an unworkable legal test, changed circumstances or intervening developments.[52]

Under any of its formulations, the merits-based approach to stare decisis is problematic. First, it is difficult under any of these approaches to identify an appropriate measure of deficiency in the original decision. Although most of the Court's decisions appear to require some minimum threshold of legal error or deficiency in order to justify overruling, it is difficult to quantify the merit evaluation in the Court's analysis. The point can be illustrated by reference to the Court's recent decisions. How does one determine that the magnitude of the Constitutional error in *New York v. United States*[53] is sufficient to justify overruling, but that the presumed error in *Roe v. Wade*[54] is not? Articulating the standard in these terms demonstrates how easily the evaluation deteriorates into the type of political debate that does not seem to be part of the calculation. Moreover, the size of the legal error is not a proxy for the magnitude of the social harm inflicted by adhering to the resulting rule. A court might well use an interpretive methodology viewed as erroneous by a majority of the Supreme Court to adopt a rule that was desirable from a social welfare perspective.

Even if the old legal rule were evaluated in terms of objective efficiency considerations—a cost/benefit analysis of the proposed legal change—the essentially policy driven nature of this analysis is well removed from the methodology that most members of the Court purport to employ in interpreting statutes or the Constitution. Moreover, there is little reason to believe that courts are well suited to conduct this analysis. The litigation context offers courts an incomplete record with which to evaluate the projected benefits of a legal change and to compare those

48. *Id.*
49. 530 U.S. 428 (2000).
50. 384 U.S. 436 (1966).
51. 530 U.S. at 442.
52. *See, e.g.*, Padden, *supra* note 38, at 1694.
53. 505 U.S. 144 (1992).
54. 410 U.S. 113 (1973).

benefits to existing law. At the same time, the Court's limited control over its agenda hampers its ability to maximize efficiency through legal change.

Second, a merit-based analysis appears insensitive to the values inherent in the system of stare decisis. A system in which courts have an obligation to adhere to precedent has been widely defended on a variety of grounds ranging from efficiency to fairness.[55] It is sufficient, for purposes of this essay, to acknowledge both that compelling arguments have been raised for adherence to precedent and to note that the Court's stare decisis doctrine continues to reflect a sensitivity to these concerns. Indeed, the merits plus approach, as described above, appears to reflect the competing values inherent in a system of precedent. Thus, although there may be value to following a precedent, that value is diminished when the precedent is unworkable. Similarly, if stare decisis is valuable in part because it protects reliance interests, the decision to overrule is less problematic when no substantial reliance interests are sacrificed by overruling.[56]

The articulation, in the Court's opinions, of the benefits of stare decisis, and the interests protected by adherence to precedent, has led some commentators to characterize the doctrine of stare decisis as a balancing test or a cost-benefit analysis.[57] The sense that stare decisis involves a balancing of competing values can most easily be seen in the plurality opinion in *Planned Parenthood v. Casey*.[58] The *Casey* opinion explicitly explained that, in reconsidering its prior holding in *Roe v. Wade*,[59] it was seeking "to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case."[60] In economic terms, we might view the Court as seeking to determine the net social value of overruling by comparing the benefits obtained through the adoption of the new legal rule with the costs imposed by overruling. Unlike an analysis that focuses

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55. *See, e.g.*, Macey, *supra* note 3 (describing efficiency justifications for doctrine of stare decisis); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595–602 (1987) (identifying four justifications for stare decisis including fairness, predictability, improved decisionmaking, and stability).

56. The Court used this reasoning in *Monell v. Dept. of Soc. Services*, 436 U.S. 658 (1978) when it overruled *Monroe v. Pape*, 365 U.S. 167 (1961) thereby eliminating the immunity of municipalities under 42 U.S.C. § 1983. The Court explained that the municipalities could not reasonably claim that they relied upon immunity when they violated the Constitution. 436 U.S. at 700.

57. *See, e.g.*, Lee, *supra* note 3 (using an economic cost-benefit model to explain the Court's stare decisis decisions).

58. 505 U.S. 833 (1992).

59. 410 U.S. 113 (1973).

60. 505 U.S. at 854.

exclusively on an evaluation of the old legal rule, this cost benefit analysis offers a mechanism for considering the systemic and case specific values of adhering to precedent, including efficiency of judicial decisionmaking, the integrity of the courts, and reliance interests.

Although this cost-benefit analysis is initially appealing, further examination reveals substantial weaknesses. The first problem, of course, is the premise that the old rule is defective, a starting point that is problematic for the reasons identified above. If the defect is assumed, it becomes difficult to justify adhering to the old rule. Modern transition analysis makes a compelling case that the transition costs of legal change are overstated. For example, the degree to which people affirmatively rely on precedent is questionable.[61] At the same time, adhering to precedent can create undesirable incentives. A party may knowingly rely on a shaky precedent in order to prevent the court from overruling it. To the extent that legal change is desirable, it may be better to encourage people to anticipate such change in planning their conduct than to protect reliance interests.[62] Thus the manufacturer of a dangerous product should be encouraged to anticipate legislation barring its sale or decisions imposing liability for damages caused by its use.[63] In addition, reliance is a function of reasonable expectations; if courts were not bound by precedent, legal actors would not rely heavily on prior decisions. Indeed, a court's decision to adhere to a shaky precedent that people expect to be overruled might frustrate reasonable expectations more than overruling the precedent.

Responses to these arguments are, of course, possible. Indeed, in the next section, this essay suggests that modern transition analysis has overstated the case for legal change. For the purposes of formulating a doctrine of stare decisis, however, increasing the emphasis on the costs of legal change does not facilitate the analysis. If, as many scholars have argued, the costs of overruling are non-trivial, a cost-benefit analysis requires the Court to weigh costs and benefits in deciding whether to overrule. This endeavor incorporates all of the traditional problems with judicial balancing tests.[64] How does one weigh the adverse impact posed by a bad or erroneous decision against the systemic harm created by too-

61. *See* Fisch, *supra* note 11, at 1086.

62. *See* Kaplow, *supra* note 8; Levmore, *supra* note 8.

63. *See Monell*, 436 U.S. at 700 (stating that "municipalities simply cannot 'arrange their affairs' on an assumption that they can violate constitutional rights indefinitely").

64. *See* Frank H. Easterbrook, *What's So Special About Judges?*, 61 U. COLO. L. REV. 773, 781 (1990) (criticizing judicial balancing tests).

frequent overruling?[65] The Court is being asked to weigh competing yet incommensurate values—the value of an identified legal improvement against the process values sacrificed by overruling. As Justice Scalia has observed, the comparison is "like judging whether a particular line is longer than a particular rock is heavy."[66] Moreover, framing the analysis as a cost-benefit analysis implies a level of quantifiability that seems unrealistic. The previously identified limitations on the Court's ability to judge the efficiency implications of overruling are rendered more troubling by the required comparison. Balancing requires the Court to do more than identify an old rule as bad, it must determine how precisely how bad the rule is.

A court's perception of the costs of overruling is likely to be largely independent of case specific factors. Although individual reliance is arguably context specific, other justifications for stare decisis—including integrity of the judicial system, efficiency of judicial decisionmaking, prevention of wasteful cycling, and so forth—are of comparable weight in all cases. Accordingly, the balancing test or cost-benefit analysis largely reverts to a merits analysis in which the key factor in most cases will be the evaluation of the old legal rule.

III. Stare Decisis and Transition Theory

The limitations of existing stare decisis doctrine result from the fact that existing theories of stare decisis fail to incorporate a normative conception of legal change. Stare decisis doctrine mediates the frequency and the manner in which legal change occurs. The decision to adhere to precedent might ultimately be viewed as a decision to refrain from legal change, either as an absolute matter or through the mechanism of overruling. The consequences then of stare decisis are threefold. First, some legal changes will not occur, as where the Court confronts an existing precedent and decides to adhere to it. Second, some legal changes will occur through a more incremental mechanism. Third, some legal changes will be made by an alternative lawmaker, such as Congress.

Thus, at one level, adhering to precedent reduces the incidence of legal change. Moreover the strength of stare decisis doctrine increases the stability of judge made law, at the cost of responsiveness. A principled

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65. *See, e.g.*, Note, *supra* note 1, at 1358 (stating that court "must balance the need to correct mistaken precedent against the damage overruling that precedent would cause to the legitimacy of the particular constitutional rules and of the Constitution as the embodiment of this country's fundamental values, and then decide whether to apply stare decisis.").

66. Bendix Autolite Corp. v. Midwesco Enterprises, 486 U.S. 888, 897 (1988).

analysis of stare decisis should therefore incorporate a perspective on the desirability of legal change.

The alternative effect of adhering to precedent is to change the manner in which legal change occurs. A court that is limited to incremental lawmaking is constrained in the magnitude of the legal changes that it is empowered to adopt and must defer to another lawmaker for more substantial changes. Although a full comparative institutional analysis is beyond the scope of this essay, one significant distinction between judicial and legislative lawmaking is the temporal scope of the legal change. The proposition that statutes apply prospectively and judicial decisions apply retroactively, is a matter of black letter law.[67] Because stare decisis sets the parameters for the choice between overruling and an alternative form of legal change, it should therefore incorporate a perspective on the appropriate temporal scope of legal change.

Modern transition theory speaks to both these issues. Commentators such as Louis Kaplow,[68] Michael Graetz[69] and Dan Shaviro[70] have analyzed transition policy from a utilitarian perspective. They maintain, in particular, that efficiency analysis counsels against the provision of transition relief when the government changes the law. Transition relief, they argue, delays the implementation of otherwise desirable legal rules. Moreover, transition relief produces undesirable effects such as reducing the incentive to anticipate socially beneficial legal changes and, perversely, increasing the incentive to engage in socially undesirable behavior.

An important policy implication of this transition analysis is that legal changes should be applied retroactively. Kaplow, in particular, has argued that in many cases new legal rules should be applied not just to future transactions but to conduct that has occurred entirely in the past.[71] Kaplow's analysis is thus consistent with the black letter law that judicial decisions apply retroactively, although Kaplow would extend this approach beyond adjudicative legal change to other areas such as legislation.[72]

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67. *See* Fisch, *supra* note 11, at 1057.
68. *See* Kaplow, *supra* note 8.
69. *See* Graetz, *supra* note 8.
70. *See* Shaviro, *supra* note 8.
71. *See* Kaplow, *supra* note 8.
72. *Id.*

The reasoning of Kaplow and others is based on several foundational assumptions that underlie modern transition theory.[73] First, Kaplow and others assume that the government behaves optimally, in terms of maximizing social welfare, when it adopts a legal change.[74] Second, Kaplow and others assume that private actors are able to anticipate legal change and respond correctly to the potential for legal change through various means including modifying their conduct, discounting and purchasing insurance.[75]

These assumptions are crucial to the conclusions of modern transition theory in several ways. The assumption of legal improvement drives the argument that it is desirable for parties to anticipate legal change and to conform their conduct to the expected change even before that change has been implemented. If a legal change is welfare reducing, it would obviously be preferable for private actors to delay any changes in their behavior. More generally, if legal change is not assumed to move in the general direction of increasing social welfare, the incentive effects that motivate the efficiency analysis are substantially reduced.

The rational expectations assumption responds to concerns about the cost that legal change imposes on private actors. Many scholars have defended transition relief as a mechanism for protecting reliance interests.[76] In addition to his argument that compensating reliance is inefficient, Kaplow is skeptical of the notion that such reliance exists—or at least would exist in a world without transition relief. Instead, Kaplow argues that private actors are able to anticipate and address the risk of legal change in the same manner that they address other risks.[77] Indeed, to the extent that parties have priced the risk of legal change appropriately when they enter into a transaction, transition relief may provide them with a windfall.

Beyond its consistency with the retroactive application of adjudicative legal change, Kaplow's analysis has broader implications for stare

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73. *See* Louis Kaplow, *Transition Policy: A Conceptual Framework*, 13 J. CONTEMP. LEGAL ISSUES 161, 172–73 (2003). The two most explicit assumptions will be the primary focus of this essay. In addition to these assumptions, the standard model further assumes that the risk of legal change is exogenous to the government's transition policy. This assumption will be considered briefly in Part V below.

74. *Id.* at 173; Levmore, *supra* note 8, at 1661–62 (arguing that, because legal change is generally good, it is desirable to promote aggressive legal change and to encourage legal actors to anticipate such change).

75. Kaplow, *supra* note 73, at 172.

76. *See, e.g.*, Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 GEO. L.J. 2225, 2244 (1997) (describing nature of reliance interests protected by stare decisis).

77. *See* Kaplow, *supra* note 8.

decisis doctrine. By definition, a precedent only binds a subsequent court when that court is prevented from applying the legal rule that would be applied in the absence of that precedent. The assumption—indeed the fundamental component of stare decisis analysis—is that the subsequent court has identified a deficiency in the precedent. Stare decisis doctrine then, is an exercise in determining the circumstances under which the court is justified in overruling that precedent. If however, legal changes are presumptively welfare increasing, the court's conclusion that the new legal rule is better should be sufficient to justify overruling. The merits evaluation essentially resolves the question of whether the legal change should occur, leaving stare decisis as addressed only to the issue of the manner in which the law should change. If, however, the primary difference between overruling and other methods of legal change is the scope of transition relief provided (largely as a result of temporal scope of the change), then Kaplow's argument against transition relief means that legal change should be effected through judicial overruling, in which the temporal scope of the change is as broad as possible, and transition relief is largely avoided. Indeed, transition theory's conclusions about the manner in which legal changes should be made, conclusions that have been applied most extensively to legislative lawmaking, are actually more consistent with the current view of adjudicative legal change.

Kaplow's analysis also reveals a more substantial problem with a case-by-case approach to transition policy. If the government's approach to legal change is case-specific, it is likely to undermine the desirable incentive effects that Kaplow identifies. Instead, parties will reduce the extent to which they anticipate and/or discount for the risk of legal change and, instead, invest excessive resources ex post in seeking to obtain transition relief at the time of the change. Regardless of one's view of the political process, a subject beyond the scope of this essay, this investment involves primarily rent-seeking. It also raises serious distributional concerns.

Thus, transition theory seems to indicate that the Court's current approach to legal change is two-thirds correct. The Court has correctly determined that its decisions should be applied retroactively and that it should avoid providing transition relief through prospective overruling. Similarly, the Court has correctly focused upon a merits evaluation in determining whether to overrule a precedent: the key issue in overruling is a comparison between the old and new legal rules. Transition theory suggests, however, that the Court's continued consideration of non-merits factors is misplaced. The government should not attempt to protect

reliance interests or minimize transition costs by constraining the manner in which legal change occurs. In many cases the proffered reliance interests will be unworthy of protection, and in most others, the market can address transition costs more effectively than lawmakers. Moreover, transition theory suggests that, to the extent that the Court's stare decisis approach is moving in the direction of an increased willingness to overrule, this approach is desirable.

IV. Assumptions and Ramifications

The conclusions of transition theory rely heavily on the core assumptions of legal improvement and rational expectations. The importance of these assumptions is reflected in the two examples cited most commonly by the transitions literature: liability for the manufacture of dangerous products[78] and elimination of tax preferences and tax shelters.[79]

One obvious question raised is the extent to which these examples are representative. Significantly, common to both areas is a robust concept of optimal social welfare. When we consider transition policy in the context of products liability, our analysis operates from the perspective of being able to identify correctly, at least ex post, that a product is unreasonably dangerous and should no longer be manufactured. This confidence perhaps stems from the role of science in the identification of product dangers and from the expectation that legal changes that restrict the production of dangerous products result from increased scientific knowledge about the dangers posed by those products. The central role of scientific progress in the legal change incorporates a degree of objectivity into the claim that the legal change is socially beneficial. Similarly, tax policy scholars share a set of core views about the structure of the tax system. Many of the examples of legal changes in the tax area involve the elimination of tax shelters and inefficient tax expenditures, changes that are readily defended as welfare improving policy changes.[80]

The rational expectations assumption is also convincingly applied to torts and tax. Experience with many dangerous products suggests that manufacturers are aware of the dangers of their products and, accordingly, the risk of increased regulation, well before such regulation is

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78. *See, e.g.*, Kaplow, *supra* note 8, at 598–602.

79. *See, e.g.*, Kyle D. Logue, *If Taxpayers Can't Be Fooled, Maybe Congress Can: A Public Choice Perspective on the Tax Transition Debate*, 67 U. Chi. L. Rev. 1507, 1508 (2000) (explaining widespread support for retroactive tax law changes among tax policy scholars).

80. *See, e.g.*, Shaviro, *supra* note 8, at 93 (citing "widespread consensus among tax policy thinkers" that the tax system maximizes welfare by eliminating all or virtually all tax preferences in order to employ the comprehensive tax base).

implemented. Indeed, evidence from industries such as tobacco, asbestos and pharmaceuticals makes a compelling case of information asymmetry—manufacturers seemingly are consistently better informed about the dangers of their product than government regulators.[81] The likelihood of information asymmetry strengthens Kaplow's argument for retroactive regulation as a necessary tool in order to incentivize manufacturers correctly and to prevent them from exploiting this asymmetry.[82] Tax scholars similarly often characterize private actors as attempting inappropriately to benefit from loopholes or regulatory gaps that were unanticipated by the legislature.[83] The taxpayer is viewed as entering into the transaction with full knowledge that the tax advantage was not intended by the legislature and with the expectation that the legislature is likely, at some point, to eliminate the loophole.[84] Indeed, scholars commonly believe that well-financed taxpayers and their lawyers are able to identify potential loopholes more quickly than regulators, making retroactive correction again a response to an informational asymmetry.[85]

It is difficult to determine how broadly transition theory's assumptions about the manner of legal change apply beyond these paradigm cases. Indeed, it is possible that these cases reflect the exception rather than the rule. Rather than being systematically welfare increasing, legal change may instead be random, cyclical or arbitrary. Many sophisticated accounts of the political process characterize legal changes as responses

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81. *See, e.g.*, Levmore, *supra* note 8, at 1671 (noting "the likelihood that tobacco companies had an informational advantage (regarding scientific and even political changes)" and concluding "that their anticipation of legal change is therefore to be encouraged").

82. *See* Kaplow, *supra* note 8, at 599–600.

83. *See, e.g.*, David Weisbach, *Ten Truths About Tax Shelters*, 55 TAX L. REV. 215, 225 (2002) (describing much tax planning as "planning around warts in the law" and arguing that such planning is of no social value).

84. *See* Daniel Shaviro, *Economic Substance, Corporate Tax Shelters and the Compaq Case*, 88 TAX NOTES 221 (July 10, 2000) (describing efforts by taxpayers to engineer tax shelters to take advantage of unintended regulatory gaps).

85. *See, e.g.*, Richard Lavoie, *Deputizing the Gunslingers: Co-opting the Tax Bar into Dissuading Corporate Tax Shelters*, 21 VA. TAX REV. 43, 65–67 (2001) (describing substantial disparity in sophistication between private-sector attorneys who structure tax shelters and Internal Revenue Service auditing agents); Peter C. Canellos, *A Tax Practitioner's Perspective on Substance, Form and Business Purpose in Structuring Business Transactions and in Tax Shelters*, 54 SMU L. REV. 47, 51 (2001) (stating that "experienced tax professionals can usually readily distinguish tax shelters from real transactions").

to factors such as political shifts or interest group pressure. These accounts offer little reason to believe that the resulting legal change will be welfare increasing. Indeed, public choice scholarship is premised on the potential for interest group rent-seeking to result in the adoption of welfare-reducing regulatory changes.

Additionally, the ability of private actors to anticipate and price the risk of legal change outside of torts and tax may be overstated. The market offers a variety of mechanisms to enable private actors to anticipate and price legal risk. One of the most common is discounting. In the stock market, for example, investors demand a higher return to compensate them for the risk of management self-dealing and asymmetric information. In order to obtain that higher return, investors discount or reduce the price they are willing to pay for securities. As Stephen Choi and Kon Sik Kim explain: "Faced with the prospect of losing money due to either lack of information or managerial opportunism, investors may adjust their behavior. In particular, securities investors may choose to either exit the capital markets, decreasing liquidity, or demand a discount as compensation for the risks they face."[86] Moreover, because investors recognize that they are unable to identify and price risks perfectly, the presence of increased risk in the markets leads to inefficient discounting and a deadweight social loss. Even where investors are able to discount appropriately, the identification and pricing of firm specific risk is extremely costly, and investor investigation costs are socially wasteful. As a result, a variety of capital market regulations are designed to reduce investor risk, which will in turn reduce inefficient discounting and improve capital formation and liquidity.

The nature of the paradigm examples used in transition analysis also minimizes the distributional concerns implicated by the inability of private actors fully to anticipate legal change. Because tax law often relies, in order to maximize government revenue, on people's inability to modify their behavior in response to legal changes, underanticipation is not viewed as highly problematic. Indeed, some tax scholars offer the prospect of a surprise confiscatory tax as a theoretical ideal, from a tax revenue perspective—the surprise element of the tax enables regulators to generate the maximum possible revenue from its imposition.[87] Similarly the strong moral component behind regulation of dangerous products undermines the reliance claims of manufacturers in tort law. The alteration of many legal rules, however, that allocate legal rights between private

86. Stephen J. Choi & Kon Sik Kim, *Establishing a New Stock Market for Shareholder Value Oriented Firms in Korea*, 3 CHI. J. INT'L L. 277, 280 (2002).

87. *See* Logue, *supra* note 79, at 1516–17 (describing argument that surprise tax maximizes efficiency by reducing anticipatory distortions in taxpayer behavior).

actors, has substantial distributional consequences. Even if, as Coase suggests, private actors can bargain around legal rules to achieve efficient outcomes,[88] a shift in the legal rules will nonetheless benefit one party at the expense of the other.[89] If the risk of legal change is inadequately anticipated, this benefit may be an unbargained-for windfall.

In particular, it may be difficult even to determine whether the parties contemplated the risk of legal change and how they intended to allocate that risk. Although the contracting process allows private actors to allocate and price all risk through consensual bargaining, in practice, limitations on the contracting process frequently result in ambiguity about the nature of the bargain. This leaves courts with the substantial difficulty of determining the terms of the contract after the fact, typically through a hypothetical effort to ascertain what the parties would have agreed to, had they considered the question. The limited ability of contract law to address these issues has led to the development of a variety of unpredictable doctrines that lead to consequences that the parties clearly did not anticipate.[90]

Expanding on this observation, even if we assume that private actors anticipate and price legal risks appropriately, the Kaplow model does not consider the potential costs associated with requiring private parties to investigate and price these risks. These investigation costs, in many cases, will not be socially productive, and may be substantial. As we move away from torts and tax, there is less and less reason to believe that private actors are well positioned to determine the risk of legal change. In addition, as Coase observed, the ability of parties to reach efficient bargains is affected by the magnitude of the transaction costs.[91] Requiring parties to bargain over the risk of legal change increases the cost of the bargain, decreasing the likelihood that the transaction will occur.

At the same time, private actors respond to risk by reducing the extent to which they rely on a particular regulatory policy. If people expect the government to eliminate the tax exemption for municipal bond interest, they will respond in two ways. First, people will demand a higher return

88. Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

89. Harold Demsetz, *Wealth Distribution and the Ownership of Rights*, 1 J. LEGAL STUD. 223 (1972).

90. *See generally* Victor Goldberg, *The Enforcement of Contracts and Private Ordering* (John M. Olin working paper series 2003) (describing judicial efforts to reconstruct the terms of hypothetical bargains due to contractual gaps).

91. *See* Coase, *supra* note 88, at 15.

on municipal bonds relative to other investments. This demand is a form of discounting the expected return from an investment in municipal bonds to reflect the increased risk of regulatory change. Second, as the return on municipal bonds moves closer to the return on other investments, some people will shift their investment decision away from municipal bonds into an investment alternative. As a result, people's reliance on existing tax treatment will be reduced.

The example demonstrates that a transition policy that requires people to anticipate the risk of legal change may impose a countervailing cost of reducing people's reliance on the existing regulatory structure. This effect may not be desirable. There are any number of reasons why the government may want private actors to rely on existing legal rules rather than anticipating a change in those rules.[92] Even within the area of tax law, many tax policies are adopted with the explicit intention of creating incentives for people to adjust their behavior.[93] For example, the government may create a tax deduction in an effort to encourage investment in low income housing. If people are uncertain about whether the government will retain the deduction or repeal it, they will invest less than they would otherwise, because the risk of regulatory change reduces the expected return on the investment. As a result, in order to obtain the desired investment level, the government will be forced to compensate investors for the risk of repeal by increasing the tax incentive. Thus, requiring people to anticipate the risk of legal change increases the cost to the government of achieving its policy objectives. Alternatively, if the government could credibly commit to a specific tax treatment, discounting would be reduced and the government would face a lower cost in implementing its policies.

The example illustrates that limiting transition relief imposes a cost that is not reflected in the existing models—the cost of reducing the government's ability to commit to a particular regulatory policy.[94] The value of commitment is recognized outside the transitions area, and enhancing the ability to commit is widely viewed as increasing net social welfare. Contract theory, for example is premised on the idea that, in most cases, "the best possible rule . . . is one in which the parties have complete

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92. *See* Kyle D. Logue, *Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment*, 94 MICH. L. REV. 1129 (1996) (identifying the value of government commitment in order to induce private party reliance on legal rules). Logue argues that government precommitment is also valuable with respect to legal issues in which the government is likely to act opportunistically. *Id.* at 1144–47.

93. *Id.* at 1150–52.

94. J. Mark Ramseyer & Minoru Nakazato, *Tax Transitions and the Protection Racket: A Reply to Professors Graetz and Kaplow*, 75 VA. L. REV. 1155, 1162–65 (1989) (countering argument against transition relief by identifying efficiency gains available through increased government commitment to legal rules).

freedom of contract, including the ability to make irrevocable commitments."[95] As Andrew Guzman observes, in the international arena, states, as well as private parties are generally better off if they are able to make irrevocable commitments.[96]

The issues raised in this section cannot fully be addressed in the context of this essay. Nonetheless, they suggest that the motivating assumptions of transition theory require some additional analysis. Transition relief may indeed be inappropriate in contexts in which legal changes are clearly welfare improving and can easily be anticipated. In particular, tax and torts may be examples of contexts in which the assumptions generally hold true. As Kaplow himself has recently acknowledged, the appropriate transition policy may be context specific, depending in part on the extent to which these assumptions hold.[97]

At the same time, the discussion suggests that analysis of these same issues should inform the debate over stare decisis. An investigation of the assumptions motivating transition theory demonstrates that appropriate transition policy is a function of the nature of legal change. As Jonathan Macey observes, the doctrine of stare decisis mediates "the primordial tension . . . between change and stability."[98] Consequently, stare decisis must incorporate positive principles about the manner in which judges make law and normative principles about the extent to which judicial lawmaking is desirable.

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95. Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1845 (2002).

96. *Id.* The government's ability to commit to a particular regulatory policy is, of course, limited. One legislature may not bind its successor. As a consequence, legal rules implemented by statute can readily be overturned. Greater commitment to regulatory policies can be achieved by implementing legal rules in the Constitution rather than ordinary legislation, because of the more significant restrictions imposed by the amendment process. Government contracting offers the government an alternative commitment device. *See, e.g.*, United States v. Winstar Corp., 518 U.S. 839 (1996). Although doctrinal constraints on the enforcement of government contracts weaken this constraint, the Supreme Court has limited these constraints, recognizing the importance of the government's ability to make credible commitments. *See* William Kovacic, *Holding Legislators Accountable for their Regulatory Promises*, 2000 L. REV. M.S.U.-D.C.L. 9 (2000). Similarly, the government can increase its commitment to legal rules by adhering to a strong doctrine of stare decisis. The range of lawmaking tools offers the government the ability to differentiate in terms of its commitment level.

97. Kaplow, *supra* note 73, at 191.

98. Macey, *supra* note 3, at 106.

V. THE CONTRIBUTION OF STARE DECISIS FOR TRANSITION THEORY'S ASSUMPTIONS

In Part III we saw that the application of transition theory leads to the conclusion that the traditional doctrine of stare decisis places excessive value on fidelity to precedent. By limiting the ability of courts to adopt better rules by overruling inferior rules, stare decisis constrains desirable legal change. Moreover, to the extent that stare decisis modifies the manner of legal change by forcing courts into incremental decisionmaking or requiring an alternative lawmaker, it substitutes transition relief for the full retroactivity of adjudicative lawmaking.

What explains stare decisis then? Given the efficiency implications of transition analysis, why don't courts overrule more frequently? Indeed, courts appear oddly reluctant to overrule. The continued search for special justifications in particular demonstrates a discomfort with overruling based simply on the defectiveness of the initial decision. In addition, the courts' continued respect for the role of precedent extends beyond the borders of stare decisis doctrine. Decisions such as *U.S. Bancorp v. Bonner Mall Partnership*[99] and *Anastasoff v. United States*[100] signal an unwillingness to permit courts to use alternative mechanisms to manipulate the binding effect of a precedent, such as vacating a decision or refusing to publish it.[101]

One possible explanation for the persistence of stare decisis doctrine is the courts' belief that the driving assumptions of transition theory apply narrowly. Courts may be reluctant to overrule precisely because the consequence of overruling is that the Court's legal change will be applied with full retroactivity and without transition relief. If courts do not view legal change as systematically welfare increasing and predictable, they may consider transition relief appropriate. Application of stare decisis requires courts to make incremental legal changes rather than overruling, affording private actors a measure of transition relief. Broader legal changes are implemented through legislation and constitutional amendment rather than overruling—procedures in which transition relief is the norm. In other words, the courts' stare decisis policy may not be a mistake that

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99. U.S. Bancorp Mort. Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994).

100. 223 F.3d 898, 899 (8th Cir. 2000), vacated as moot, 235 F.3d 1054 (8th Cir. 2000) (en banc).

101. Similarly, the Court's effort to limit the precedential value of its decision in Bush v. Gore, 531 U.S. 98, 109 (2000), to the case at bar has generated widespread academic critique. *See, e.g.*, Samuel Issacharoff, POLITICAL JUDGMENTS, IN THE VOTE: BUSH, GORE AND THE SUPREME COURT 70 (Cass R. Sunstein & Richard A. Epstein eds., 2001) (stating that "the limiting instruction is either meaningless or reveals the new equal protection as a cynical vessel used to engage in result-oriented judging by decree").

fails to capture the full value of retroactivity for judicial lawmaking. Rather, it may be a deliberate choice to limit the scope of judicial rulemaking precisely because of the limited ability of courts to provide transition relief.

One response to this argument is that it proves too much. Stare decisis supplies the most minimal constraint on judicial lawmaking. Courts have extensive lawmaking powers irrespective of their power to overrule precedent, and the transition costs of adjudicative legal change apply to judicial lawmaking outside the context of an overruling. If transition relief is warranted, why does new judge-made law apply retroactively?

One possible answer is that courts are poorly positioned to determine the appropriate scope of transition relief. Courts may not have full information on the costs associated with legal change because of the limitations of the judicial process.[102] Categories of private actors who are affected by the legal change may not be present before the court. The court may lack information on the extent to which private actors have been able to anticipate the change and to allocate the risks associated with it. The range of mitigation options available to the court may not enable the court to tailor transition relief appropriately. Thus, even where a legal change is costly, judicially implemented transition relief may not be an optimal solution.

Alternatively, it may be inappropriate for courts to exercise discretion over transition relief because greater discretion affords the court the ability to engage in greater activism. The requirement that judicial lawmaking operate retroactively prevents courts from adopting some legal rules that they might otherwise adopt. Thus, one may reasonably argue that the Warren Court's aggressive adoption of new rules of constitutional criminal procedure might have been constrained if the Court had not been able to limit the retroactive effect of its decisions.[103]

The possibility that judicial discretion over the use of transition relief will affect judicial lawmaking suggests an important additional dimension to transition theory. Transition theory generally assumes that the likelihood of legal change is independent of the manner by which that change occurs, including the government's transition policy. Although some commentators

102. *See* Kenneth Culp Davis, *Judicial, Legislative and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1, 13 (1986) (identifying institutional limitations on the Courts' ability to gather "legislative facts").

103. *See* Fisch, *supra* note 11, at 1059 (explaining that prospective adjudication enabled the Warren court to recognize new constitutional criminal procedure rights without freeing large numbers of previously convicted defendants).

have identified the possibility that transition relief will cause government actors to internalize the costs of legal change, thereby reducing the likelihood of legal change, the analysis has not fully explored the relationship between transition policy and the lawmaking process.

What if legal change is endogenous to the choice of transition policy? It is possible, indeed likely, that the government's transition policy will affect the extent to which private actors seek to influence the lawmaking process. In particular, if the government adopts a policy of providing no transition relief, once people identify the risk of legal change, it may be rational for them to invest resources to oppose the change rather than adjusting their behavior to reflect the anticipated change. Private actors who have predicted legal change accurately may be able to block the proposed change.[104] The scenario is particularly problematic under the assumption that legal change is welfare improving. Under that assumption, efforts to block the change would be wasteful rent-seeking, and the potential consequence of that rent-seeking would be the prevention of socially valuable legal change.[105] Under this view of the world, transition relief need not be justified in terms of the transition costs borne by the losers; instead, it may offer a mechanism for redistributing the gains from the legal change in order to temper the losers' resistance to the change and to permit it to proceed.[106]

The doctrine of stare decisis mediates between stability and responsiveness, but criticisms of stare decisis based on the argument that it undesirably prevents legal change are misguided. Stare decisis does not prevent legal change, it merely reshapes the process by which that change occurs. By taking legal change as a given, transition theory makes a similar error. Although transition theory focuses on the process by which change occurs, it cannot overlook the broader effects of that process.

This essay has not attempted a comprehensive analysis of the assumptions underlying transition theory. Instead, the essay suggests that further investigation of these assumptions and the contexts in which they apply is critical for both transition theory and stare decisis. In particular, the existing debate over stare decisis may be clarified by exploration of

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104. *See, e.g.*, Leif Wenar, *The Concept of Property and the Takings Clause*, 97 COLUM. L. REV. 1923, 1936–37 (1997) (describing process by which some groups lobby to obtain a legal change from which they benefit while other groups lobby to prevent the change as leading to a deadweight social loss).

105. *See, e.g.*, Michael Abramowicz, *Market-Based Administrative Enforcement*, 15 YALE J. ON REG. 197, 254–55 (1998) (advocating that government use administratively determined payments to compensate losers in order to facilitate adoption of generally efficient legal changes).

106. Such a distribution would be analogous to that necessary to move from Kaldor Hicks efficiency to Pareto efficiency.

the issues identified in this essay. Several conclusions are possible. One possibility, based on the insights of transition theory, is that the doctrine of stare decisis should be abandoned. A second possibility is that courts and legislatures are—and should continue to be—different.[107] Adherence to precedent, retroactive legal change, and other differences may produce valuable differentiation in the lawmaking process. A third possibility is that courts and legislatures are linked, and changes to the operations of one institution must be carefully considered to prevent unintended responses elsewhere.

VI. CONCLUSION

Existing theories of stare decisis rely on a merit-based analysis in which the primary consideration is an evaluation of the old legal rule. Such an approach seems defensible, in efficiency terms, on the theory that social welfare is improved when inferior legal rules are replaced. Moreover, modern transition theory maintains that legal changes should be immediately and broadly implemented, without the use of transition relief such as grandfathering, delayed effective dates or compensation. These principles are consistent with existing judicial treatment of legal transitions, including the fact that judicially adopted legal changes are applied retroactively.

Both stare decisis and transition analysis are based on essential assumptions about the nature and manner of legal change. This essay questions the validity of these assumptions. The essay argues that, at least in some cases, legal change should not be presumed to be efficient or predictable. At the same time, although anticipation of legal change may reduce transition costs, it may also lead to inefficient discounting or cause parties to avoid desirable transactions.

The persistence of the doctrine of stare decisis offers a reason to question the assumptions that motivate modern transition theory. Indeed, the continued importance of reliance interests in courts' assessments about the decision to overrule suggests that judicial experience with legal change may differ from theory's predictions. Courts may be continuing to focus

107. We may, for example, believe that adjudicative change is responsive to different factors than legislative change. *See, e.g.*, William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 300-01 (1988)) (arguing that "courts have some comparative advantages over the legislature in making legal rules, because they are less directly accountable to interest group pressure").

on transition costs because of a perception that legal change may not be presumptively efficient and that, even if it is, private actors may lack the ability to anticipate the possibility of legal change appropriately. Indeed, the doctrine of stare decisis highlights existing gaps in the jurisprudence of legal change. Analysis of the issues identified in this essay, in turn, offers the potential to develop a coherent theory of stare decisis.